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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 252

SAFEWAY STORES, INCORPORATED,
Appellant,

v.

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC. and LOUIE J. SPEED, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

APPELLEES' BRIEF ON THE MERITS

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Statement of the Case.

Safeway's original object was to capture a larger share of the Oklahoma market by cutting prices below cost on certain traffic items. As the second largest grocery chain in the United States, with sales running in excess of one billion, eight hundred million dollars for 1954, Safeway already enjoyed 17½ per cent. of all grocery sales in the State as a whole (R. 252, fol. 554), and as high as 30 per cent. in some of the principal cities (R. 246, fols. 536-537). Still it was not satisfied (R. 250, fols. 549-550). It was not enough that Safeway's gross was continually increasing (R. 253, fol. 557). In Oklahoma City, where there

were about 400 grocery stores of all types, Safeway's 16 supermarkets accounted for 17 per cent. of the business (R. 282, fol. 612). Not content, Safeway set for itself a quota of 20 per cent. (R. 250, fol. 550).

Safeway contended that it was entitled to sell below cost because, among its thousands of competitors, one or more in each locality was actually selling the same items below cost either directly or by giving trading stamps on cash purchases (R. 200, fols. 449-450); and all that Safeway intended was to meet those prices defensively (R. 218, fols. 484-485).

The trial court having found that Safeway was not acting "in good faith to meet the price of a competitor" as permitted by the Act (Sec. 598.7) but, on the contrary, "Safeway, without legal justification, wilfully and intentionally reduced its prices in an effort to increase its volume, to the detriment of other grocers" (R. 447, fol. 943), and the Oklahoma Supreme Court having affirmed on the basis of these facts, Safeway shifts its tactics. Unable any longer to contend that it did not violate the Act, Safeway now contends that the Act, as applied, is unconstitutional.

The original object of the Oklahoma Retail Grocers Association in this lawsuit was to head off a price war in the grocery business by enjoining Safeway from selling below cost. Having succeeded in this, its present object is to sustain the validity of the Oklahoma Unfair Sales Act as the bulwark of the independent grocer against the great chains. There are some 1700 members of the Association (R. 98, fol. 195) and they represent about 30 per cent. of all grocery sales in the State (R. 479, fol. 1029). It was the Grocers Association which originally sponsored the Oklahoma Unfair Sales Act in 1949 (R. 110, fol. 225); backed its amendment after the Oklahoma Supreme Court invalidated it in *Englebrecht* v. *Day*, 201 Okl. 585; 209 P.

2d 538 (1950); and secured its subsequent approval in *Adwon* v. *Oklahoma Retail Grocers Association, Inc.*, 204 Okl. 199; 228 P. 2d 376 (1951).

The Oklahoma Unfair Sales Act, in the interest of preserving competition, prohibits sales below cost where the intent and result is to injure competition. It is not a price fixing statute but merely outlaws "loss leader" merchandising.

Broadly speaking, the Act defines cost as invoice or replacement cost, whichever is the lower, plus freight, plus cartage, plus 6 per cent. for overhead in the absence of proof of a lower cost of doing business (Sec. 598.2); and it prohibits sales when made below cost with the intent and purpose of injuring competition, where the result would tend to deceive any purchaser or to create a monopoly (Sec. 598.3).

In the highly competitive retail grocery field a substantial number of so-called traffic items such as canned milk, sugar, coffee, tea, flour, shortening, soaps and detergents are sold at, or very close to, statutory cost (R. 480, fol. 1030).

On July 21, 1954, Safeway broke with an advertisement in the "Daily Oklahoman" (R. 106, fols. 212-213; Ex. "D", R. 466) declaring that it would sell certain traffic items at prices which, it subsequently admitted, were below cost (R. 200, fols. 449-450). The excuse that Safeway offered for this was that, out of a total of 400 grocery stores in the Oklahoma City area (R. 282, fol. 612), eight or nine were selling the same items at cost and issuing trading stamps (R. 281, fol. 611). Safeway contended that the effect of giving trading stamps was to cut the price (R. 220-221, fols. 489-492); and that all Safeway was doing in cutting its prices on selected traffic items was meeting the trading stamp prices (R. 218, fols. 484-485).

There was nothing new about trading stamps. They had been given in Oklahoma as early as 1911 (R. 132, fol. 277), years before the enactment of the Oklahoma Unfair Sales Act. The Sperry and Hutchinson Company had been engaged in the trading stamp business across the nation for over 60 years and in Oklahoma for 45 years (R. 373, fol. 799). Whereas a price cut below the statutory minimum would trigger a price war, trading stamps had never done so (R. 262, fol. 575). On the contrary, they had been considered the means of promoting sales through the allowance of a discount for the payment of cash (R. 78, fol. 144) which, by its very definition, does not affect price (R. 414, fol. 874). They were recognized as something extra (R. 353, fols. 756-757) but neither the grocers nor their customers (R. 361, fol. 774) looked upon them as something which cut prices (R. 131, fol. 275; R. 347, fols. 743-744); and the Attorney General of Oklahoma had specifically ruled that they did not. In an opinion dated May 8, 1950, he had said,

> "Thus the weight of law, logic and reason, as declared by decisions of various courts, holds clearly and distinctly to the view that the practice of giving trading stamps does not amount to, nor will it sustain a charge of, price cutting." (R. 624, fol. 1173)

Perfectly aware of the Attorney General's opinion (R. 623, 626, fols. 1173-1175), and aware, also, that, if trading stamps did in fact cut prices below statutory cost, they could be enjoined (R. 238, fol. 521; Sec. 598.5 (a)), Safeway deliberately cut its prices on selected traffic items by what it took to be the value of trading stamps, notwithstanding that this resulted in sales below the statutory minimum.

The reaction of the Grocers Association was immediate; it filed suit in the District Court of Oklahoma County

under Sec. 598.10 to enjoin Safeway's sales below cost (R. 467-473, fols. 1011-1019); secured a restraining order (R. 474-475, fols. 1020-1023); and obtained a temporary injunction (R. 477, fol. 1025). Having made its point, the Grocers Association thereupon dismissed the action without prejudice (R. 476, fol. 1024); issued a public statement (R. 110, fol. 221); and hoped for peace in the grocery industry. This wound up the first action on August 31, 1954 (R. 476, fol. 1025).

Two weeks later, or, to be more precise, on September 15, 1954, Safeway struck again with another advertisement in the Oklahoma City papers in which it offered an even larger assortment of traffic items below statutory cost, purportedly to offset the value of trading stamps (Exs. "C-1" to "C-14"; R. 460-465, fols. 1005-1009). As a matter of fact, Safeway cut even deeper when it could find an excuse (see for example, Ex. "H", R. 551, fol. 1102). And this time, it carried its attack to other parts of the State (Enid, Norman, Shawnee and Tulsa), with advertisements hammering selected traffic items below cost (Exs. "C-1" to "C-14"), not upon the ground that it was meeting trading stamp competition (R. 253, fols. 557 and 558; R. 260, fol. 571), but upon the ground that one or more of its competitors were selling like items as loss leaders at these prices (R. 163, fol. 349).

Other chains followed suit (R. 121, fol. 252; R. 268, fol. 585); and, if something had not been done, there would have been a price war (R. 122, fol. 254). Safeway was prepared to meet prices, cut for cut, indefinitely, without regard to the statutory minimum, even if it resulted in a vicious price war (R. 269-270, fols. 586-588). Nothing short of an injunction would have stopped Safeway (R. 269, fol. 586). And so, in response to inquiries and complaints from its membership (R. 103, fol. 203; R. 122, fol. 255), the Grocers Association jumped in again

and brought the price cuts to a halt with a temporary restraining order (R. 50-51, fols. 50-52). In the opinion of one of the principal officers of the Association, this was "the salvation of the independent retailers" (R. 121, fol. 248). If it had not been done, the smaller independents would have been driven out of business (R. 122-123, fols. 255-259).

This time no truce was offered at the temporary injunction stage: the complaint against Safeway was tried and won on the merits. At the same time, Safeway's cross-complaint against Louie J. Speed, Inc. for giving trading stamps with groceries sold at statutory cost was defeated on the merits. The stamps were worth 2.5 per cent. of the price paid (R. 438, fol. 930).

Only two issues of any importance were presented. Safeway lost on both of them.

The first issue was whether Safeway acted in good faith when it sold below cost allegedly to meet competition. Mr. Christensen, Safeway's Division Manager for Oklahoma and Arkansas (R. 206, fols. 458-459), who made the decision to cut the prices (R. 220, fols. 489-490), protested that he only intended in good faith to meet his competitors' prices (R. 218, fols. 484-485; R. 230, fol. 506). On the evidence, the trial court did not believe him. It found that Safeway acted in bad faith; that its purpose was not to meet competition but to divert trade; and that one illegal price did not justify another, saying:

> "Safeway, without legal justification, wilfully and intentionally reduced its prices in an effort to increase its volume, to the detriment of the other grocers." (R. 447, fol. 943)

> "[O]ne violation of the law will not justify another * * *." (R. 441, fol. 934)

Intent is always difficult to establish (R. 443, fols. 937-938), and that is why such a statute as the Oklahoma Unfair Sales Act provides that "Evidence of advertisement, offering to sell, or sale of merchandise by any retailer or wholesaler at less than cost to him, shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition" (Sec. 598.5(c)).

The good intentions professed by Safeway's Mr. Christensen were overwhelmed by evidence to the contrary:

1. When Safeway cut its prices the first time on the alleged excuse that some of its competitors were cutting prices by issuing trading stamps, Mr. Christensen knew that the Attorney General of Oklahoma had ruled that trading stamps did not cut price (R. 623-624; fols. 1172-1173).

2. When Safeway cut its prices the second time, it had just been through two days of hearings and half a day of argument on the law in an unsuccessful attempt to persuade the District Court not to enjoin it from cutting prices below cost in asserted opposition to trading stamps (R. 240, fols. 525-526; R. 477, fols. 1025-1026).

3. On both occasions Safeway was aware that, instead of attacking in the market place at the risk of setting off a price war, it could have applied for an injunction (R. 238, fol. 521; R. 280, fol. 607). This was the method provided by the statute (Sec. 598.5(a)); it was the method which the Grocers Association adopted; and it was the method which the District Court in both actions indicated that Safeway should have followed* (R. 442-443, fols. 935-937).

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* Safeway's excuse for not following the orderly course provided by the statute was that, as a matter of Company policy, it never sued a competitor (R. 243, fol. 530). To await suit instead of bringing it is not as praiseworthy as might be supposed. The news that "Safeway has been sued again for selling too low" is wonderful publicity.

4. To exploit what it claims were the lower prices of a handful of competitors, Safeway was willing to trigger a price war (R. 262, fol. 575) which would have demoralized the entire industry.

5. Mr. Christensen, Safeway's chief administrative officer and the man who directed the warfare, never took the trouble even to read the Oklahoma Unfair Sales Act (R. 236, fol. 518).

6. Whether the prices which Safeway claimed to be meeting were legal or illegal was a matter of indifference to Mr. Christensen (R. 239, fol. 523); he was prepared to meet them, cut for cut, *ad infinitum* and even if this should result in a vicious price war (R. 269-270, fols. 586-588).

7. Safeway must have known, when it advertised for 23 cents what everyone else was advertising for 25 cents (R. 357, fol. 764), and for 95 cents what others were advertising for $1.00 (Ex. "H", R. 551, fol. 1102), the housewife would conclude that Safeway's prices were lower, even though some of the other merchants also gave trading stamps (R. 361, fol. 774; R. 446, fols. 941-943).

8. Safeway must also have known that to advertise price cuts on selected traffic items would lead the housewife to believe, contrary to the fact, that Safeway's prices were cheaper across the board (R. 357-358, fols. 764-765) and would therefore divert trade to Safeway.

It is foolish to suggest that Safeway did not know and did not intend the natural consequences of its acts. Safeway's conduct points to only one conclusion: Safeway could have gone the injunction route if it had been really disturbed by what it claimed to be below-cost sales, but what Safeway wanted was not to enjoin the loss leadering

but to exploit it in the guise of meeting competition.* Safeway wanted to take advantage of every violation, real or fancied, to grab for itself a greater share of the market at the expense of every independent grocer in Oklahoma City, Enid, Norman, Shawnee and Tulsa. Safeway knew that if it enjoined its competitors, it would derive no competitive advantage, but if it matched one loss leader with another, and sold for 95 cents what the stamp merchant sold for $1.00 it would get the business; and the trial court so found (R. 446, fols. 941-942).

To have condoned such a course, as the trial court pointed out, would have invited chaos and accomplished the ruin of hundreds, if not thousands, of small independent merchants (R. 442, fol. 936).

The second issue was whether the issuance of trading stamps by Louie J. Speed, Inc. with merchandise sold at statutory cost had the effect of reducing the price and hence violating the Act. These were S&H Green Stamps issued at the rate of one for every ten cents paid in cash or within a normal discount period.** Speed sold for cash and on credit (R. 155, fol. 325). When a customer bought on credit, there was a 2 per cent. charge (R. 158, fol. 330) and he was not given stamps unless he paid his bill by the 10th of the following month (R. 194, fol. 429). When a customer accumulated a full book of 1200 stamps by making purchases amounting to $120 he could secure from The Sperry and Hutchinson Company an item of redemption merchandise worth $3.00 at retail (R. 137-138, fols. 288-290). The discount for cash, therefore, amounted to 2.5 per cent.

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* If a mama and poppa store sold chicken below cost, Safeway wanted to "meet" that competition in all 16 of its supermarkets in Oklahoma City.

** See S&H Contracts, R. 80-88.

Safeway called an economist from Southern Methodist University who testified that, in his opinion, trading stamps were not the means of affording a discount for cash (R. 305, fol. 655) but were things bought and sold like cans of tomatoes (R. 305, fol. 656) and so resulted in tied sales; that the expense to the merchant should not be included in his cost of doing business, either as a financial or a promotional expense but only as part of the cost of his merchandise (R. 311, fol. 667); and that, no matter how stamps might be classified, discounts for the payment of cash had the effect of reducing prices (R. 304, fols. 653-654).

The Grocers Association called an eminent accountant who testified that, in his opinion, trading stamps were one means of affording a discount for the payment of cash; that their issuance did not result in tied sales (R. 394-395, fols. 832-834); that their expense was properly included in financial and promotional costs rather than inventory (R. 420, fol. 886); and that, by definition, discounts for the payment of cash do not reduce prices (R. 414, fol. 814), but relate to the terms of sale (R. 392-393, fols. 828-830*; R. 394, fol. 832).

The Oklahoma Courts resolved this conflict in favor of the view of the expert called by the Grocers Association and against the view of the expert called by Safeway, thus supporting the 1950 opinion of the Attorney General of Oklahoma which Safeway had faced from the outset.

On the facts presented, the trial court found (1) that Safeway sold certain selected traffic items below statutory

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* In this connection it should be noted that the transcript is garbled. Record page 393 lines 4 and 5 should read,

"Q. Did you hear Doctor Johnson expound the theory that *cash* discounts, like trade discounts, reduce the price?"

and lines 30 and 31 should read,

"And the purpose of the discount for cash is to affect the terms of Sale."

cost (R. 450, fols. 949-950); (2) that, although this was allegedly to offset in good faith the value of trading stamps issued by certain merchants in Oklahoma City, actually it was not in good faith and was without legal justification (R. 450, fol. 950); (3) that, similarly, the sales which were made in Tulsa, Enid, Shawnee and Norman below cost were not made in good faith but were made to meet prices which Safeway knew or had reason to know were illegal and therefore furnished no justification (R. 450-451, fols. 950-951); (4) that Safeway's real intent and purpose was unfairly to divert trade from its competitors in violation of the Oklahoma Unfair Sales Act (R. 451, fols. 951-952); (5) that Speed, by selling merchandise at cost and issuing trading stamps therewith as a discount for the prompt payment of cash did not violate the Act (R. 451, fol. 952); and (6) that issuing trading stamps having a value not in excess of 3 per cent. of the purchase price constitutes a discount for cash which does not reduce the price in violation of the Act (R. 451, fol. 953). Accordingly, the temporary injunction against Safeway's sales below cost in violation of the Act and its issuance of trading stamps, cash register receipts or other evidences of credit as a discount for the payment of cash, of a value in excess of 3 per cent., was made permanent (R. 452, fol. 953). At the same time, the Court refused to enjoin Speed from issuing single stamps so long as their value did not exceed 3 per cent. of the purchase price (R. 452-453, fol. 954).

SUMMARY OF ARGUMENT

POINT I

The State Court decision rests on an adequate non-federal basis. The only issues presented to the Oklahoma Court were (1) whether Safeway could meet its competitors' prices even if they were illegal; and (2) whether trading stamps cut price. Both issues were decided by analysis of the intent and language of the Act, evaluation of the testimony at the trial and consideration of the decisions of sister states. No resort was made to federal principles.

POINT II

Safeway bases its Due Process Clause argument on the existence of a hypothetical class of sales by its competitors that are below cost yet not in violation of the Act. In practice it is doubtful if such a class exists. It is certain that no such case was presented in the courts below. Moreover, even were the Act construed to prohibit meeting all prices below one's competitor's cost there would be nothing arbitrary in such a provision in an anti-loss-leader statute. The day is gone when this Court uses the Due Process Clause to strike down state laws; regulatory of business because they may be out of harmony with a particular school of thought.

POINT III

Safeway claims it has the right to cut prices below the statutory minimum in order to meet the competition of grocers selling at the statutory minimum and giving cash discounts in trading stamps. Based on the testimony

of the grocers and the experts who drew a sharp distinction between the practical and theoretical market effects of trading stamps on the one hand and loss leaders on the other, the Oklahoma Courts were justified in permitting stamps not in excess of 3 per cent. as cash discounts and prohibiting Safeway's price cuts. The differences in the practices warranted a difference in their treatment. The Court's decision involved no invidious discrimination.

POINT IV

Having raised the issue whether trading stamps cut prices in violation of the Oklahoma Unfair Sales Act, Safeway has no cause to complain because the Oklahoma Courts decided that issue. The Court's decision enjoined Speed as well as Safeway. Its judgment is *res adjudicata* as to all 1700 members of the Grocers Association.

POINT V

Safeway's claim that the federal antitrust laws preempt the field in which the Oklahoma Unfair Sales Act operates comes too late when the first assertion of preemption is made in the brief submitted to this Court on the merits. No such question may properly come before this Court unless it has been previously submitted to the State courts and preserved in the Notice of Appeal and the Jurisdictional Statement. Even if the question were properly before this Court, there is no basis for the claim that the federal antitrust laws preempt this area.

POINT I

Jurisdiction was improvidently noted. The State Court decision rests on adequate non-federal grounds.

This Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based on an adequate and independent non-federal ground, even though a federal question was argued and decided improperly. *Murdock* v. *City of Memphis*, 20 Wall. 590, 636 (1874); *Berea College* v. *Kentucky*, 211 U. S. 45, 53 (1908). Even where the judgment of the state court concededly rests upon two grounds, one of which is federal and the other non-federal in character, this Court's jurisdiction fails if the non-federal ground is "independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935) and the cases cited therein.

The issues presented to the Oklahoma Courts were (1) the procedural question of whether Safeway had the right to ignore the injunctive relief offered it by the Oklahoma Unfair Sales Act in favor of self help in the market place where such self help involved meeting an illegal price with an illegal price; and (2) whether trading stamps not in excess of 3 per cent. were a bona fide discount for cash that did not cut prices in violation of the Act.

The Oklahoma Supreme Court was concerned "only in the interpretation and application of Oklahoma's Unfair Sales Act as applied to the particular facts in this case * * * so as to give it practical meaning and effect within the legislative intent" (R. 635, fol. 1187).

Its decision was based on the factual finding that Safeway had not acted in good faith to meet competition, but rather that "Safeway, without legal justification, wilfully and intentionally reduced its prices in an effort to in-

crease its volume, to the detriment of other grocers." (R. 447, fol. 943). On this state of facts the Oklahoma Supreme Court said:

> We are of the opinion that this injunction granted by the trial court against Safeway was proper, because under our statute the appropriate remedy was by injunction and not by retaliation or retaliatory action, such as was practiced by Safeway. In this respect the judgment of the trial court is affirmed (R. 637, fol. 1190).

With respect to the second issue, the Oklahoma Courts found that the stamps were a bona fide cash discount and did not cut prices in violation of the Act. That decision was based exclusively on an analysis of the Oklahoma Unfair Sales Act, the testimony of the grocers and the experts heard at the trial, and on decisions from sister states. That issue presented no federal question and was decided as a matter of local law.

The judgment of the Oklahoma Supreme Court being based upon adequate non-federal ground Appellee respectfully submits that probable jurisdiction was improvidently noted and the appeal should be dismissed.

POINT II

Safeway bases its due process challenge on a hypothetical case never presented to the Courts below.

> "We do not go beyond the circumstances of the case. Generalizations are treacherous in the application of large constitutional concepts." *Hughes* v. *Superior Court*, 339 U. S. 460, 469 (1949)

The case that the Oklahoma Courts decided was the case presented on the evidence, and no other. Thus the Oklahoma Supreme Court said:

> "We are concerned herein only in the interpretation and application of Oklahoma's Unfair Sales Act as applied to the particular facts in this case. * * * [T]his Court will refrain from theorizing." (R. 635, fol. 1187)

The case presented was one in which Safeway contended that all it did was to meet in good faith its competitors' prices and that meeting competition was no violation of the Act because merely to meet a competitor's price would not sustain a charge of wrongful intent nor would it tend to injure competition. Safeway lost on these factual issues: the courts found that Safeway was acting in bad faith, that what it was actually doing was cutting prices below cost with the intent of injuring competition, and that this tended unfairly to divert trade in violation of the Act.

The case presented was one in which Safeway contended that it could meet its competitors' prices even if they were illegal.

> Q. All right; now what was your policy,—was it your policy to meet any price of a competitor, regardless of whether it was legal or not? A. It was our policy to meet the price.
>
> Q. Regardless, is that right? A. Regardless, yes, sir. (R. 239, fol. 523)

Safeway recognizes that the record amply sustains the findings which the Oklahoma Courts made against it, and that, therefore, in this Court it can no longer make an argument on the facts.*

Safeway recognizes further that it would be fruitless for it to renew in this Court its plea that it was entitled

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* "[T]he theory that in a federal system the state court is the proper forum to settle issues of fact is the basic consideration that has led the Court to give considerable deference to state court findings." Note, 55 Harv. L. Rev. 644, 646 (1942) and the cases cited therein.

to match one illegal price with another, a course which would in one fell blow accomplish the destruction of the statutory controls and the demoralization of the grocery market. (Cf. decisions *re* meeting competition under Robinson-Patman. *F. T. C.* v. *Standard Oil Company*, 355 U. S. 396 [1958]; *Standard Oil Company* v. *F. T. C.*, 340 U. S. 231 [1951]; *F. T. C.* v. *Staley Manufacturing Co.*, 324 U. S. 746 [1945].)

Accordingly, Safeway now contends that there is something unique about the Oklahoma Act that makes it unconstitutional.

> "The Oklahoma Act is the only one of thirty such statutes that prohibits meeting all prices below statutory cost, whether lawful or unlawful.
>
> "The Oklahoma Courts have been confused by this meeting competition defense because it is the only one of its kind." (Appellant's Br. p. 14)

In the Oklahoma Supreme Court, Safeway faced in precisely the opposite direction, saying:

> "We do not agree with the implication in the majority opinion that there is anything unique about the Oklahoma Act, as it was carefully patterned after those of other states where the legislation had been held constitutional. (*Adwon* v. *Oklahoma Retail Grocers Association*)." (R. 665, fol. 1224)

The argument that Safeway offers to support this about-face is that the injunction under the Act in the present case does not permit Safeway to meet its competitor's price in every case, but only when its competitor is selling at or above his cost. Safeway suggests under its interpretation of the injunction that cases can be imagined in which sales below cost would be perfectly legal because

of the inoffensive motives which prompted them, and that, in such cases, Safeway would find itself unable to enjoin the sales because they would be entirely lawful, and equally unable to meet the prices because, by hypothesis, they would not be at or above the seller's costs.

Our own view is that the injunction should be interpreted in the light of the issues actually litigated and the decision actually made by the Oklahoma Courts, and, as we have said, no such issue was litigated or adjudicated.

The injunction does no more than adopt the language of the statute itself.

What the Act says is that

> "* * * to sell * * * at less than cost * * * with the intent and purpose of * * * injuring a competitor * * * [is] * * * unfair competition and contrary to public policy * * * where the result * * * is to tend to deceive * * * or to substantially lessen competition * * * or to tend to create a monopoly in any line of commerce." (Sec. 598.3)

What the injunction says is that

> "Safeway Stores, Inc. * * * [its] agents, servants, clerks, and employees * * * are * * * enjoined and restrained from advertising for sale, offering for sale, and selling, at retail * * * within the State of Oklahoma, at prices which are less than cost to the retailer * * * and in violation of the provisions of said Oklahoma 'Unfair Sales Act', * * * ." (R. 452, fol. 953)

That is to say, with wrongful intent and effect.

The Act goes on to provide a specific exemption which permits

> "Any retailer * * * to sell * * * at a price made in good faith to meet the price of a competitor who is selling the same article or products of comparable quality at cost to him as a * * * retailer." (Sec. 598.7)

So, too, does the injunction go on to provide that Safeway may

> "* * * meet in good faith the prices of competitors who are selling the same articles or products of comparable quality at cost to them as retailers." (R. 452, fol. 953)

Since the injunction merely adopts the language of the Act, there is no basis for a claim that the Court intended to go farther in the injunction than the legislature intended to go in the Act. The question resolves itself, therefore, into whether the Act, as it stands, would prohibit Safeway in good faith to meet the lawful below-cost prices of its competitors.

In the Court below, Safeway itself answered this question in the negative. Here again it finds itself obliged to reverse its position.

In the Oklahoma Supreme Court Safeway contended that, by specifically permitting a retailer in good faith to meet the price of a competitor selling at cost to him, the legislature merely indicated one of several affirmative defenses that might be pleaded, and did not intend to foreclose the introduction of others. Thus, in its brief in support of its Petition for Rehearing, Safeway said, referring to *People* v. *Pay Less Drug Store,* 25 Cal. 2d 108, 153 P. 2d 9 (1944).

> "The *Pay Less* case was appealed to the Supreme Court where defendant argued that the Legislature had attempted to make the exception of meeting legal prices of competitors exclusive and the Act was, therefore, unconstitutional. In 153 P. 2d 9, at page 12, the Court carefully points out that it is not an exclusive defense but that defendant may show that its price reductions were made because of business necessity and not to injure competitors.
>
> 'The obvious and only effect of this provision is to require the defendants to go forward with such

> proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent. They may present facts showing that they were within the *express exceptions regardless of actual intent; or they may introduce evidence of another necessity not expressly included to show that sales were made in good faith and not for the purpose of injuring competitors or destroying competition.*' (Italics ours)" (R. 664, fol. 1223).

So construed, there is nothing in the law and, hence, nothing in the injunction which would prevent Safeway from selling below cost to meet the lawful below-cost price of a competitor if the necessity arises in the future and if, at that time, Safeway acts in good faith. Actual disposition of the question will have to await a case which will present it for adjudication.

Even if the statute should in fact prohibit Safeway from meeting the lawful below-cost prices of its competitors, there would be in this no denial of equal protection or due process.

Obviously, if Safeway cannot meet the lawful below-cost prices of its competitors, neither can its competitors meet the lawful below-cost prices of Safeway. By the same token, neither can enjoin the lawful below-cost sales of the other. *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, 532, 537 (1949).

The purpose of this Act, like all other Unfair Sales Acts is to prevent the lessening of competition and to curb the tendency toward monopoly in any line of commerce by outlawing loss leader merchandising. Within the context of this Court's previous decisions it cannot be said that the statute is not reasonably designed to meet that problem. Even if some inequalities under the statute could be found, as Safeway seems to suggest, an

inability to meet competitors' prices in every instance would not and should not destroy the Act. Legislation in the field of economic regulation need not be drawn with such mastery that every conceivable situation will fall within its embrace.

As this Court said in *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160 (1912):

> "If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

See also cases collected in *Hughes* v. *Superior Court*, *supra*, 339 U. S. at 468-469.

The possible existence of variations from the statutory scheme will not support the argument that the statute is arbitrary or discriminatory or that, as drawn, it is irrelevant to the policy the legislature had in mind in its enactment. *Nebbia* v. *New York*, 291 U. S. 502, 539 (1933).

More recently in *Williamson* v. *Lee Optical Company*, 348 U. S. 483, 487-488 (1954), the Court said:

> "• • • [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise,

> improvident, or out of harmony with a particular school of thought. See *Nebbia* v. *New York*, 291 U. S. 502; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *Olsen* v. *Nebraska*, 313 U. S. 236; *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525; *Daniel* v. *Family Ins. Co.*, 336 U. S. 220; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421. We emphasize again what Chief Justice Waite said in *Munn* v. *Illinois*, 94 U. S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"

The hypothetical cases which Safeway now posits under its interpretation of the injunction have not been shown to exist, and the likelihood that they may arise in some future litigation seems remote.

The statute itself provides that "Evidence of advertisement, offering to sell, or sale of merchandise by any retailer * * * at less than cost to him, shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition." (Sec. 598.5[c].) The record in this case leaves no doubt that to sell groceries below cost diverts trade. And there is a well-settled maxim in the law that a man must be held to intend the natural consequences of his acts.

But, in any case, it is certain that there is no such class to be found in this record. Prima facie, all sales below cost in this case were made with intent to injure competitors and to destroy or substantially lessen competition. No evidence was offered to rebut the prima facie evidence of wrongful intent, and, no matter what Safeway may now say, it is nearly inconceivable that a grocer could successfully contend that in selling milk at five cents a quart, he was not violating the Act, because his sole intent was the wholly innocent one of making friends and that he had no intention of unfairly diverting these "friends" from his competitors. The hypothesis that

grocers may innocently engage in loss leadering belies the practicalities with which the legislature and the courts are concerned.

> "Respondents pose hypothetical situations which they say may rise up to plague them. However, 'we think it would not be good judicial administration,' as our late Brother Jackson said in *International Salt Co.* v. *United States*, 332 U. S. 392, 401 (1947), to strike the contested paragraph of the order to meet such conjectures. The Commission has reserved jurisdiction to meet just such contingencies.' As actual situations arise they can be presented to the Commission in evidentiary form rather than as fantasies." *F. T. C.* v. *National Lead Co.*, 352 U. S. 419, 431 (1957)

Safeway itself concedes that this issue, which is the subject of its first point and the key to its second, is "elusive" and suggests that its "elusory nature" is inherent in the way the statute was drafted. (Appellant's Br. p. 17) It might better have been described as "illusory": the Oklahoma Courts never had such a case before them and never undertook to decide it. When such a case is presented, they will decide it, but as the Oklahoma Supreme Court said, "Until a proper factual case is presented which requires a clear determination and offers a practical situation in which all the conflicting problems and considerations of the Act involved are apparent, this Court will refrain from theorizing." The Court immediately went on to say, "This is particularly true in cases involving the field of economic regulation." (R. 635, fol. 1187) This Court more than once has said as much. *F. T. C.* v. *National Lead Co.*, *supra*; *Hughes* v. *Superior Court*, *supra*; *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411 (1905).

How the hypothetical situations advanced in Safeway's argument will be met by the Oklahoma Courts must await the development of litigation which will present them to the courts for decision. They do not arise on the facts presented here.

POINT III

To sell selected traffic items as loss leaders is not the same as to give trading stamps across the board.

> "The more complicated society becomes, the greater the diversity of its problems and the more does legislation direct itself to the diversities. Statutes, that is, are directed to less than universal situations. Law reflects distinctions that exist in fact or at least appear to exist in the judgment of legislators—those who have the responsibility for making law fit fact. Legislation is essentially empiric. It addresses itself to the more or less crude outside world and not to the neat, logical models of the mind. Classification is inherent in legislation; the Equal Protection Clause has not forbidden it. To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic." *Morey* v. *Doud*, 354 U. S. 457, 472 (1957). dissenting opinion of Mr. Justice Frankfurter.

The question presented is whether the Oklahoma Courts denied Safeway the equal protection of the laws when they construed the Oklahoma Unfair Sales Act to permit grocers to continue to issue trading stamps across the board, and denied Safeway the right to cut prices below cost, to the value of the trading stamps, on selected traffic items. We think they did not. There is a clear distinction between the two practices that justifies a difference of treatment.

At the outset, it should be remembered that trading stamps have been given for over sixty years. Safeway claims, and we do not doubt, that, today, half the families of America save them (Appellant's Br. p. 38). It should also be noted that trading stamps are given on the dollars paid, not on the items purchased. It makes no difference what is in the market basket. There can be any one of an almost infinite number of combinations of individual items the total cost of which may be $1.00—some, all, or none may be traffic items sold at cost. But no matter what the actual combination may be, the number of stamps is always ten for every dollar paid in cash. The Court should also bear in mind that the full $1.00 is charged, paid and rung up on the cash register. Finally, the prices advertised are the shelf prices actually paid, not prices arrived at by deducting the value of the stamps.

It is one thing to advertise a broad variety of groceries, some of which may be traffic items sold at cost, and say: "We give S&H Green Stamps." It is quite another thing to advertise selected traffic items at prices below the statutory minimum and say: "The prices on many of the items in this ad have been lowered sufficiently to offset the value of trading stamps." (R. 463, fol. 1007)

Mr. Kamp, who had been in the grocery business since 1910 (R. 118, fols. 243-244) and had been the treasurer of the state and county grocers' associations since their inception (R. 118-119, fols. 244-245), said, when called as a witness for Safeway, that stamps had never been considered price cuts in the grocery trade and that he did not so consider them.

> "A. Why I wouldn't call it a reduction in price if anybody gives stamps because these folks that have given stamps have been giving them so long

> that they get used to them. It is whatever they want to call it, but I don't call it a reduction in price." (R. 131, fol. 275)

Mr. Morrison, President of the Grocers Association at the time the instant suit was commenced, (R. 344, fol. 736), added that he did not believe the consumer looked upon trading stamps as price cuts, saying:

> "A. Well, I don't think the consumer,—I mean your hypothetical case of the consumer coming in and buying sugar identifies this,—I don't think she looks at it that way at all. She thought she was paying a dollar for that sugar." (R. 361, fol. 774)

In other words, when the grocer sold sugar for $1.00 and gave ten stamps worth 2½ per cent., neither he nor his customer were under the impression that the sugar had been sold for 97½ cents.

This has been going on for years without weakening the price structure of the industry or creating the impression that anyone was indulging in loss leader merchandising, but the instant that one of the grocers (Safeway) advertised that it was selling sugar at 97 cents to offset the value of trading stamps, other chains followed suit and the war was on. In abstract theory one might argue that there was little difference in the end result to the consumer purchasing the sugar, but the impact upon the market, as the trial court recognized, was quite different:

> "You see, here is what we have, gentlemen,—Speed advertises some merchandise for, say $1.00; the defendant, Safeway, advertises [fol. 942] it for, lets say, 97 cents, or 98 cents, and stands on the theory that they are meeting the green stamp competition. That appears in the public press,—in the newspapers; it appears on the shelf. The only thing that the purchaser sees is that the article is priced at 98

> cents; he doesn't give any further thought to the trading stamp,—he just sees that the other man has it two cents cheaper." (R. 446, fols. 941-942)

The argument which Safeway made in the Oklahoma Court, namely, that to cut prices on selected traffic items is the same thing as to issue trading stamps across the board, does not, therefore, stand up. To bolster its position Safeway now urges for the first time in this Court that there is a theoretical identity between the two practices. Its new argument is that, if trading stamps constitutes a discount for cash, so does price cutting on selected items. In other words, Safeway now contends that all it was doing was to match the cash discount which its trading stamp competitors gave in stamps with a discount of its own given by netting the cash price; and goes on to say that, since the Oklahoma Courts did not allow this, the effect is to permit discounts for cash to be given in stamps but not in cash.

This is nonsense. Safeway never even pretended that its price cuts on selected traffic items were intended as discounts for the payment of cash; the trial court was never invited so to consider them; and no adjudication was ever made by the Oklahoma Courts to the effect that Safeway could not then or cannot now grant discounts for the payment of cash. There is not a line either in the opinions or in the injunction itself which prohibited Safeway or now prohibits Safeway from giving discounts for the payment of cash either in cash, cash register receipts, trading stamps, or any other evidence of credit.

Let the record be quite clear. What Safeway did and wants to do is not to give a cash discount but rather each week to cut prices 2 or 3 or 4 per cent. on selected traffic items. Safeway speaks of this as a "cash discount" by way of a "netted transaction." This is loss leader merchandising, and nothing else.

A true discount for the payment of cash is an allowance which is made by the seller to the buyer to reward him for paying cash, not for buying tomatoes. The amount which the buyer receives is arrived at by multiplying the sum of money paid by the rate of discount allowed, here 2½ per cent. If cash is not paid, the discount is not earned. And it makes no difference whether the subject of the sale is sugar, sarsaparilla or Sunday's dinner with all the trimmings; the discount is computed on the total cash paid.

Safeway did not offer a discount to all who paid cash, no matter what they bought, but, on the contrary, merely offered to sell traffic items which it selected each week as loss leaders. We repeat, the *ex post facto* excuse that Safeway now, and for the first time, offers in this Court that its price cuts on selected traffic items were in effect cash discounts, is nonsense.

Was it, then, a denial of equal protection to allow the continued use of trading stamps across the board, that is to say, without regard to the contents of the market basket, and at the same time to enjoin Safeway from cutting prices on selected traffic items? In view of the easily discernible practical, as well as theoretical, differences between the two situations, we think that Safeway clearly failed to demonstrate that there was any such denial.

In *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79, (1911), citing *Bachtel* v. *Wilson*, 204 U. S. 36, 41 (1906); *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36 (1910); *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251, 256 (1907); *Munn* v. *Illinois*, 94 U. S. 113, 132 (1876); *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 615 (1898), this Court said:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

"2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

"3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

"4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

In *Central Lumber Co.* v. *South Dakota, supra,* 226 U. S. 157 (1912), the Court upheld a statute which prohibited price discrimination against the contention that it violated the Equal Protection Clause because it affected certain lumber dealers, while leaving a number of their competitors undisturbed. The Court, speaking through Justice Holmes, in language which is equally applicable to the case at bar, said:

"The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole

field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205.

"That is not the arbitrary selection that is condemned in such cases as *Southern Ry. Co.* v. *Greene*, 216 U. S. 400. The Fourteenth Amendment does not prohibit legislation special in character. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294. It does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 562. *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62. If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411." (pp. 160-161)

Similarly, in *Heath & Milligan Co.* v. *Worst*, 207 U. S. 338 (1907), the Court, in upholding a statute which required the labeling of the ingredients of mixed paints, but not of paste paints, said:

"• • • [T]here is a distinction between the paints, and the evils to which the statute was addressed may not exist or be as flagrant in one as in the other. There, indeed, may be a degree of competition between them, but other circumstances and conditions may have directed the legislative discretion. This record certainly does not present any data to make it certain that the discretion was arbitrarily exercised. Legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary or unreasonable." (pp. 355-6)

In *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U. S. 129 (1921), the Court citing *Lindsley* v. *Natural Carbonic Gas Co., supra,* sustained an act which prohibited certain corporations from operating any cotton gin, while containing no similar prohibition as to individuals. The Court noted that it was settled law that a State may impose conditions on the right of corporations to do business in the State, even to the extent of excluding them altogether, and then made the following statement:

> "This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the State in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils. It is clearly settled that any classification adopted by a State in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of the Fourteenth Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed.

Similarly, in *Madden* v. *Kentucky*, 309 U. S. 83, 88 (1940), the Court said:

> "Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

In *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400 (1936), the Court said:

> "The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extent to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Sproles* v. *Binford*, 286 U. S. 374, 396; *Semler* v. *Oregon Board*, 294 U. S. 608, 610, 611."

More recently, in *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106 (1949), the Court held that a New York City traffic regulation which forbade the operation of any vehicle carrying advertisements of others, but permitted advertisements of the products of the vehicle's owner, did not violate the Equal Protection Clause. Appellant argued that the distraction of pedestrians and other drivers resulting from both types of advertisements was the same and that hence the classification was without a rational basis.

The Court concluded, however, that:

> "The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they

> use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.
>
> "We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection". (p. 110)

Finally, in *Williamson* v. *Lee Optical Co. of Oklahoma*, 348 U. S. 483 (1955), the Court considered a statute which prohibited the fitting of eyeglass lenses by other than licensed ophthalmologists or optometrists, but exempted all sellers of ready-to-wear glasses from its provisions. Upholding the statute under the Equal Protection Clause, the Court said:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas*, 310 U. S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Dental Examiners*, 294 U. S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A. F. of L.* v. *American Sash Co.*, 335 U. S. 538. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." (p. 489)

As was demonstrated at the trial, the competitive effect of single trading stamps given with articles of merchandise sold at statutory cost is substantially different from

the competitive effect of Safeway's sales below cost. While the grocer who issues trading stamps advertises, marks, rings up on the cash register, and sells, such articles *at* the statutory cost, Safeway advertises, marks and sells the same articles at a lesser price. While the former's sales have not led to price wars (which the Unfair Sales Act was intended to prevent), the latter's sales below cost have had precisely that effect. Who can say, in these circumstances, that there is no conceivable rational basis for the treatment given below-cost price cuts as distinguished from the issuance of single trading stamps under the Oklahoma Unfair Sales Act as interpreted by the Oklahoma Supreme Court?

The finding of the Oklahoma Courts is also grounded in prior decisions by state courts of last resort covering a long period of years. As the Oklahoma Supreme Court said:

> "[F]rom an examination of our statutes and those of other states, together with appellate court decisions construing same, we conclude that the weight of law, logic and reason clearly and distinctly show that the practice of giving trading stamps in the usual customary manner does not amount to, nor will it sustain, a charge of price cutting." (R. 645, fol. 1202)

Accord: *Bristol-Myers Co.* v. *Lit Bros. Inc.*, 336 Pa. 81, 6 A. 2d 843 (1939); *Food and Grocery Bureau, Inc.* v. *Garfield*, 20 Cal. 2d 228, 125 P. 2d 3 (1942); *Trade Commission* v. *Bush*, 123 Utah 302, 259 P. 2d 304 (1953); *Sperry and Hutchinson* v. *Margetts*, 15 N. J. 203, 104 A. 2d 310 (1954); *Gever* v. *American Stores Co.*, 387 Pa. 206, 127 A. 2d 694 (1956). See also *Weco Products Co.* v. *Mid-City Cut Rate Drug Stores*, 55 Cal. App. 2d 684, 131 P. 2d 856 (1942)).

And as Safeway well knew before it provoked this controversy, the Attorney General of Oklahoma had reached this same conclusion in 1950 (R. 624, fol. 1173). (Opinion of the Attorney General of Oklahoma, May 8, 1950.)

Whatever else may be said and whatever conflict there still may be over the classification of trading stamps, we respectfully submit that the distinction drawn by the Oklahoma Courts between trading stamps given across the board and price cuts on selected traffic items was not an invidious one; there were both practical and legal bases for it. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co., supra,* 348 U. S. at 489.

Safeway's argument upon the Equal Protection Clause fails.

POINT IV

Safeway has no just cause to complain because the Oklahoma Courts decided the issues which it presented.

When Safeway cut prices on selected traffic items, the Grocers Association sued for an injunction. Safeway's answer took the form of a statement of confession and avoidance; it admitted the price cuts but claimed that they only matched price cuts resulting from the issuance of trading stamps. In this way Safeway put trading stamps in issue the first time. After the litigation got under way, Safeway filed a cross petition to enjoin Speed from issuing trading stamps with merchandise sold at minimum prices. In this way Safeway put trading stamps in issue a second time. These issues had to be decided.

Sec. 598.2 of the Act defines the "cost to the retailer" to mean invoice or replacement cost, whichever is lower;

"less all trade discounts except customary discounts for cash"; to which there are to be added certain other charges. The Oklahoma trial court decided, on the basis of the evidence presented, that trading stamps not exceeding 3 per cent. in value qualified under the Act as a customary discount for cash and therefore were not to be treated as deductions from the price.

How can Safeway be heard to complain because the Court decided the issues that Safeway presented?

The decision was affirmed by the highest court of Oklahoma and will therefore be binding on every other court in the state where the question is presented in the future.

The decision is equally binding on Speed, who was issuing trading stamps, and will serve as *res ajudicata* in any future controversy between Safeway and the 1,700 members of the Grocers Association.

What constitutes a "customary discount for cash" is a question of fact for the Oklahoma Courts to decide. It is not something so indefinite that the failure of the legislature to freeze it at a stated per cent. leaves the statute too vague to enforce, or constitutes an unlawful delegation of power by the legislature to the courts.

> "We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. *United States* v. *Wurzbach,* 280 U. S. 396, 399 (1930). Impossible standards of specificity are not required *United States* v. *Petrillo,* 332 U. S. 1 (1947). The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Connally* v. *General Construction Co.,* 269 U. S.

385 (1926)." *Jordan* v. *DeGeorge*, 341 U. S. 223, 231-232 (1950) See also the numerous cases there cited in n. 15.

POINT V

Safeway's preemption argument is not properly before this Court, and, even if it were, has no merit.

Supreme Court Rule 10(c) requires that the Notice of Appeal "shall set forth the questions presented by the appeal." It states, further, that: "Only the questions set forth in the Notice of Appeal or fairly comprised therein will be considered by the court." In compliance with Rule 10 Safeway filed a Notice of Appeal which set forth four questions. Each of them alleged that, for one reason or another, the Oklahoma Unfair Sales Act, as here applied, violated the Fourteenth Amendment (R. 693-695; fols. 1249-1252).

Supreme Court Rule 15(c)(1) requires that the Jurisdictional Statement called for by Rule 13 shall contain "the questions presented by the appeal, expressed in the terms and circumstances of the case * * *." It, too, goes on to provide that: "Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." In compliance with Rule 15 Safeway filed a Jurisdictional Statement which paraphrased and restated the same four questions under the Fourteenth Amendment which had been originally stated in its Notice of Appeal (Jurisdictional Statement, pp. 3-4).

Earlier, in its Petition in Error to the Oklahoma Supreme Court, Safeway had similarly asserted that the

judgment of the trial court denied it the equal protection of the law, in violation of the Fourteenth Amendment, and that the judgment also deprived it of property without due process, in violation of "the Fifth [sic] Amendment" (R. 4, fol. G).

Without complying with the requirements of the foregoing Rules of this Court, Safeway now for the first time asserts that the Oklahoma Unfair Sales Act is unconstitutional because, under the Supremacy Clause, Article VI, Clause 2 of the Constitution of the United States, the Federal antitrust laws preempt the field. This, of course, is quite a different federal question, having nothing whatever to do with the Equal Protection or Due Process Clauses of the Fourteenth Amendment. Not having been presented to the Oklahoma Courts, not having been adjudicated by the Oklahoma Courts, not having been specified in the Notice of Appeal, and not having been included in the Jurisdictional Statement, this new question is not properly before this Court. *Braniff Airways* v. *Nebraska Board*, 347 U. S. 590, 597, n. 14 (1953); *State Farm Ins. Co.* v. *Duel*, 324 U. S. 154, 160 (1944); *Charleston Assn.* v. *Alderson*, 324 U. S. 182 (1944); *Whitney* v. *California*, 274 U. S. 357, 360 (1926).

The fact that Safeway may have preserved for this Court questions under the Fourteenth Amendment, does not mean that it preserved a Supremacy Clause question which was never presented to or adjudicated by the lower courts and was not included in the Notice of Appeal or Jurisdictional Statement filed with this Court.

> "[W]e are compelled to hold that we are confined to a discussion of the only Federal question which this record presents * * *." *Dewey* v. *Des Moines*, 173 U. S. 193, 200-201 (1898)

Before presenting a question as far reaching as this, a decent regard for the federal system requires that that question first be presented to the State courts. It is clear that it cannot be presented for the first time in this Court in the Appellant's Brief on the Merits.

Even on the merits, however, which we believe this Court never properly reaches, the claim of preemption fails. Federal and state anti-trust laws have existed and have been enforced side by side for over half a century.

> "That state legislatures have the right to deal with the subject-matter and to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question." *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 107 (1908)

See also *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115 (1904); *Smiley* v. *Kansas*, 196 U. S. 447 (1904).

In *Parker* v. *Brown*, 317 U. S. 341 (1942), this Court had occasion to consider whether the Sherman Act prohibited a State from maintaining a commodity stabilization program because of its admitted effect on interstate commerce. The Court rejected the argument which Safeway now makes, saying:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a State or its officers or agents from activities directed by its legislature." (p. 350)

In *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1955), this Court restated and amplified the basic criteria for preemption as outlined previously in *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1946),

> "*First*, '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that

> Congress left no room for the states to supplement it.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. at 230.
>
> • • •
>
> "*Second*, the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230, citing *Hines* v. *Davidowitz*, [312 U. S. 52, 67]
>
> • • •
>
> "*Third*, enforcement of state • • • acts presents a serious danger of conflict with the administration of the federal program."

Starting at one end of the range of tests which are commonly referred to in this area of the law, it is quite clear that Safeway cannot claim that the conflict which it alleges between the state and federal laws is such that compliance with one is defiance of the other.

At the other end of the range, it would seem that anyone conversant with the administrative realities of trade regulation in such a volatile field as the retail grocery industry must realize that to invalidate the State Act and thrust upon the federal authorities the burden of controlling incipient price wars before they reach major proportions would be to hamper, rather than aid, the attainment of Congress' objective as manifested by the antitrust laws.

CONCLUSION

It is respectfully submitted that this Court should dismiss the appeal or affirm the judgment of the Court below.

Respectfully submitted,

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Proof of Service

I, M. A. NED LOONEY, one of the attorneys for Oklahoma Retail Grocers Association, Inc., and Louie J. Speed, Inc., Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of April, 1959, I served copies of the foregoing Appellees' Brief on the Merits on Safeway Stores, Incorporated, a corporation, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to its respective attorneys as follows:

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